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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 28 2005
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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is an IT consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(g)(2) state, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 24, 2002. The proffered wage as stated on the Form ETA 750 is $60,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. As of the filing date, the beneficiary lived and worked in Florida.

We note that the petitioner had originally obtained the labor certification on behalf of a different alien, named [redacted] The petitioner never filed a petition for that alien, and substituted the present beneficiary for the alien originally named on the labor certification.

The petitioner provided the following information on its I-140 petition form:

Date Established	2002	Gross Annual Income	$3.4 million
Current # of employees	0	Net Annual Income	[blank]

The Form I-140 advises that failure to *completely* fill out the form could result in denial of the petition. The petitioner did not explain why the space marked "Net Annual Income" was left blank.

In support of the petition, the petitioner submitted a copy of its 2001 Form 1120S Income Tax Return for an S Corporation, containing the following information:

Gross receipts	$3,281,794	Ordinary income	$137,938
Total income	689,961	Cost of labor	1,311,270
Compensation of officers	94,503	Cash assets at end of year	(49,878)
Salaries and wages	[blank]	Current liabilities	109,998

The director issued a request for evidence on November 4, 2003. This notice reads, in part:

> Form I-140 indicates that the petitioner currently has 0 employees. Please clarify. . . .
>
> Additionally, Form I-140 indicates that the petitioner was established in 2002, yet the petitioner has provided a Form 1120S . . . related to its business activities during 2001. Please clarify. . . .
>
> The petitioner must submit evidence to establish that it had the financial ability to pay the offered wage as of January 24, 2002, **and continues to have such ability**. Such evidence must include your latest annual report, your latest U.S. tax return, or audited financial statements. . . .
>
> Additionally, the petitioner must submit a complete list of the immigrant petitions it currently has pending with the Bureau, to include the offered wage for each.

(Emphasis in original.) The director also requested evidence to show ability to pay as of 2002, the year of filing. In response, counsel states "The correct number of current employees is thirty one (31). We apologize for the error of '0' on the Form I-140." Counsel also states that the petitioner was incorporated in 1998, and that the 2002 date was also in error. Counsel provides a list of five aliens for whom the petitioner has immigrant petitions pending. Each of these aliens has a proffered salary between $55,000 and $60,000 per year, for a total of $287,000 per year in combined salaries.

The petitioner submits a copy of its 2002 Form 1120S return, containing the following information:

Gross receipts	$2,997,318	Ordinary income	$32,606
Total income	553,895	Cost of labor	1,790,415
Compensation of officers	[blank]	Cash assets at end of year	3,599
Salaries and wages	[blank]	Current liabilities	160,128

The director denied the petition on January 9, 2004, stating that the petitioner's ordinary income for 2002 was "significantly lower than the offered wage" for the beneficiary, let alone for all five aliens for whom petitions were pending. The director also noted that the petitioner did not employ the beneficiary in 2002, which indicates that the petitioner's expenses for that year did not include the beneficiary's salary.

On appeal, counsel asserts: "a company's profit for a taxable year is an incomplete source for determining whether a company has the financial ability to pay the wages offered to a beneficiary." Counsel states that the 2002 tax return "showed a profit of $32,606 after all expenses, including employee payroll." The tax returns, however, do not reflect *any* "employee payroll." The space labeled "Salaries and wages" is blank on both returns. The returns, instead, reflect only "Cost of labor," which indicates that the petitioner relied upon contract labor, rather than direct employees, in 2001 and 2002. This is reinforced by statements and documentation submitted on appeal. We shall return to the issue of contract labor later in this decision.

Counsel states: "In evaluating a company's financial ability to pay, the Service should look at various sources apart from the corporate income tax return. In this case the corporate tax returns alone prove a financial

ability to pay when they are evaluated correctly by looking at whether the salary was paid for the 'position' rather than whether it was paid to the specific 'beneficiary' listed on the I-140 petition." As noted above, the petitioner did not report any wages paid to "employees" in 2002. The petitioner paid for "labor," but the lump sum of total labor cost payments does not demonstrate that the beneficiary's specific position was filled and fully paid in 2002.

Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Counsel states that the petitioner's "corporate bank statement for the year end 2002 shows a balance of $177,284.07, the corporate bank statement for the year end 2003 shows a balance of $68,710.86, and the corporate bank statement for January 30, 2004 shows a balance of $123,487.90." Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Also, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not shown on its tax return. The petitioner's 2002 tax return, which the director relied upon to determine the petitioner's available assets, shows only $3,599 in cash assets as of the end of calendar year 2002. The petitioner does not explain why the figures in the bank statement and the tax return differ by a factor of almost 50. Also on the 2002 tax return, the petitioner claimed *total* assets of only $168,794, almost all of which took the form of loans to shareholders. Furthermore, the tax return, unlike the bank statements, shows liabilities in addition to assets. The petitioner's reported current liabilities at the end of 2002 totaled over $160,000, which would absorb almost 90% of the cash in the petitioner's bank account at the time.

As we have noted, counsel argues that another worker held the beneficiary's position during 2002 and 2003, and therefore the petitioner must have had, and did have, the ability to compensate a worker in that position. [redacted] resident and CEO of the petitioning company, states that the company has heretofore used the services of subcontractors, but "by hiring directly we believe we can save close to 25%" of labor costs. He adds: "We intend to replace these subcontractors with the new hires that we are pursuing." Counsel states:

> Originally [redacted] was going to fill the position; however, [redacted] did not join [the petitioning company]. Therefore, the company offered a position to [the

> beneficiary] which is the same full-time, permanent position which was certified by the Department of Labor. . . .
>
> The company has historically employed some independent contractors at a very high rate and the intention has been to replace the highly paid independent contractors with full-time, permanent employees. . . . While this particular beneficiary was not working for the company during 2002 and 2003, the person that he is being petitioned for to replace was employed and paid more than the wage stated on the labor certification application. Specifically, he is replacing [redacted] who was paid a salary of $79,714.85 for 2002 and $95,359.62 for 2003 which is higher than the $60,000 required wage stated on the labor certification application.

The petitioner submits copies of Forms 1099-MISC issued to [redacted] showing the amounts specified by counsel. Neither counsel nor the petitioner specifies the number of contractors that the petitioner has employed at any one time. We note counsel's prior statement that the petitioner's "number of current employees is thirty one (31)." Counsel is demonstrably aware of the difference between a contractor and an employee, but the tax documents submitted by the petitioner do not show that the petitioner had any salaried employees in 2002.

The petitioner does not demonstrate that [redacted] performed the same duties as those set forth in the Form ETA 750. If [redacted] performed other kinds of work, then the beneficiary will not be replacing that individual's function in the business, and the funds used to compensate [redacted] cannot be shown as proof of the petitioner's ability to pay.

Finally, counsel argues: "the number of I-140 petitions currently pending at the Service Center is not indicative of whether the company has the financial ability to pay the beneficiary." According to documents provided by the petitioner, the petitioner has committed to paying these five aliens $287,000 per year. The petitioner must either show its ability to pay this full amount, or concede its inability to pay the proffered wage to at least some of these aliens.

Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to all beneficiaries are realistic, and therefore that it has had the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner has documented payments to only one contractor, [redacted] These payments do not total $287,000 per year. The record offers no information about the contractors that the other named beneficiaries will purportedly replace. The petitioner must show that it has been spending more than $287,000 per year on named contractors, who have been performing essentially the same duties that will be assigned to the beneficiaries.

Given the petitioner's reported payments of over a million dollars in "labor costs" each year, the petitioner's explanation is plausible on its face, but insufficiently supported by the available evidence. In order to verify these claims, and resolve other issues in this proceeding, the director must offer the petitioner the opportunity to submit the following evidence:

- the names and duties of all of the subcontractors whom the petitioner intends to replace with the five beneficiaries;
- proof of the total compensation paid to those subcontractors in 2002 and subsequent years;
- contemporaneous documentation to show how many employees the petitioner employed in 2002 and in subsequent years, and how much the petitioner paid these employees;
- contemporaneous documentation to show how many contractors or subcontractors the petitioner utilized in 2002 and in subsequent years, and how much the petitioner paid the contractors;
- copies of the petitioner's corporate tax returns for 2003 and 2004; and
- a credible and thoroughly documented explanation for the $173,685.07 discrepancy between the petitioner's reported cash assets as of December 31, 2002 (as reported on the tax return), and its bank balance as of the same date.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted beyond that specified above, and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.